

FEDERAL MAGISTRATES COURT OF AUSTRALIA

REDDY v MINISTER FOR IMMIGRATION & ANOR [2009] FMCA 560

MIGRATION – Spousal visa – whether Tribunal failed to consider argument not expressly advanced by applicant – whether Tribunal erred in its consideration of the applicant’s claim.

Migration Act 1958 (Cth), ss.65, 349, 359A
Migration Regulations 1994

Ahvazi v MIMA [2002] FCA 279
Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 22
Aung v Minister [2000] FCA 1562
Craig v The State of South Australia (1995) 184 CLR 163
Gnanasambanther v MIMA [2000] FCA 1911
Minister for Immigration and Citizenship v Le [2007] FCA 1318
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 180 ALR 1
NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No. 2) (2004) 144 FCR 1
Paramanathan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28
Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476
Ratumaiwai v MIMA [2002] FCA 311
Samarasekera v MIMA [2001] FCA 1335
SBBA v Minister for Immigration & Multicultural & Ethnic Affairs [2003] FCAFC 90
SOK v Minister for Immigration and Citizenship (2008) 249 ALR 651
SZBEL v Minister (2006) 231 ALR 592

Applicant:	SALESH NADAN REDDY
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	BRG 538 of 2008

Judgment of:	Wilson FM
Hearing date:	20 February 2009
Date of Last Submission:	5 March 2009
Delivered at:	Brisbane
Delivered on:	1 July 2009

REPRESENTATION

Counsel for the Applicant:	Mr See
Solicitors for the Applicant:	Tobin King Lateef Lawyers
Counsel for the first Respondent:	Ms Wheatley
Solicitors for the first Respondent:	Clayton Utz
Counsel for the second Respondent:	N/A
Solicitors for the second Respondent:	N/A

ORDERS

- (1) The application filed 18 August 2008 is dismissed.
- (2) The applicant shall pay the first respondent's costs of and incidental to the application fixed in the sum of \$5,000.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
BRISBANE**

BRG 538 of 2008

SALESH NADAN REDDY
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicant seeks judicial review of the decision of the Migration Review Tribunal dated 21 July 2008 and notified to the applicant on 22 July 2008, in which it affirmed the decision of the delegate of the first respondent refusing to grant the applicant a Partner (Migrant)(Class BC) visa under s. 65 *Migration Act 1958*.
2. The Tribunal's decision was a "privative clause decision" and, as a result, it can only be set aside on judicial review if jurisdictional error is shown: *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 506-8, 511.
3. The grounds of the application as filed were:
 - a) The Tribunal member committed jurisdictional error in the exercise of his powers under s. 349 *Migration Act* by failing to

apply the appropriate tests as to whether or not the applicant satisfied the primary criteria for the grant of a permanent visa as set out in Clause 100.21, Part 100 of Schedule 2 to the *Migration Regulations 1994*;

- b) The Tribunal member committed jurisdictional error in the exercise of his powers under s. 349 of the Act, by failing to take into account relevant considerations as to whether or not the applicant met the requirements of Clause 100.22(4) of the Regulations;
 - c) The Tribunal member committed jurisdictional error in the exercise of his powers under s. 349 of the Act by failing to provide clear particulars of any information that the Tribunal member considered would be the reason or part of the reason for affirming the decision of the Minister in accordance with s. 359A of the Act.
- 4. The third ground was abandoned by the applicant's counsel (Applicant's written submissions, paragraph 12; T6/25).
 - 5. A general description of what constitutes jurisdictional error is to be found in the decision of Brennan, Toohey and McHugh JJ in *Craig v The State of South Australia* (1995) 184CLR163 at 179:

"If ... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."
 - 6. See also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
 - 7. The two substantive arguments raised by the applicant turn essentially on the same point, namely whether the Tribunal was obliged to consider whether the applicant met the criterion in cl. 100.22(4) in

Schedule 2 of the *Migration Regulations 1994* and thereby satisfied one of the criteria for the grant of the spouse visa.

8. The applicant approaches this point in two ways. First, it is contended that the Tribunal member erroneously restricted his enquiry as to whether the statutory criteria were satisfied by looking only at two of the criteria, with a predisposition towards the correctness of the Minister's delegate's decision. That is, it is argued that the Tribunal did not conduct a full de novo hearing as it was required to perform under the *Migration Act*. Secondly, it is argued that the materials before the Tribunal raised a case that cl. 100.221(4) was satisfied, even though that case was not articulated by the applicant, and the Tribunal ought to have considered it.
9. It is necessary to have regard to the statutory scheme that governed the consideration of the Tribunal. It was common ground that the criteria for the granting of a Partner (Migrant)(Class BC) visa are set out in Clause 100.2 of Schedule 2 to the *Migration Regulations*.
10. As is made clear by Clause 100.221(1) the applicant must satisfy one of the requirements set out in subclauses (2), (2A), (3), (4) or (4A) in order that a visa be granted. The two criteria that were the particular subject of focus before this Court were (2) and (4) which, at the relevant time provided:

“100.221(2) The applicant meets the requirements of this subclause if:

(a) the applicant:

(i) is the holder of a Subclass 309 (Spouse (Provisional)) visa; or

(ii) was the holder of a Subclass 309 (Spouse (Provisional)) visa granted before 1 November 1999 that has ceased to be in effect because the applicant:

(A) was outside Australia at the end of the 30 month period specified in the Subclass 309 visa for travelling to and entering Australia; or

(B) left Australia after the end of the 30 month period specified in that visa for travelling to and entering Australia; and

- (b) the applicant is the spouse of the sponsoring spouse; and*
- (c) subject to subclauses (5), (6) and (7), at least 2 years have passed since the application was made.*

...

100.221(4)The applicant meets the requirements of this subclause if:

(a) the applicant first entered Australia as the holder of a Subclass 309 (Spouse (Provisional)) visa and either:

- (i) continues to be the holder of that visa; or*
- (ii) is no longer the holder of that visa because the visa:*

(A) was granted before 1 November 1999; and

(B) has ceased to be in effect because the applicant:

(I) was outside Australia at the end of the 30 month period specified in the Subclass 309 visa for travelling to and entering Australia; or

(II) left Australia after the end of the 30 month period specified in that visa for travelling to and entering Australia; and

(b) the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring spouse has ceased; and

(c) after the applicant first entered Australia as the holder of the visa mentioned in paragraph (a) – either or both of the following circumstances applies:

(i) either or both of the following:

(A) the applicant;

(B) a member of the family unit of the sponsoring spouse or of the applicant or of both of them;

has suffered domestic violence committed by the sponsoring spouse;

(ii) the applicant:

(A) has custody or joint custody of, or access to;

or

(B) has a residence order or contact order made under the Family Law Act 1975 relating to;

at least 1 child in respect of whom the sponsoring spouse:

(C) has been granted joint custody or access by a court; or

(D) has a residence order or contact order made under the Family Law Act 1975; or

(E) has an obligation under a child maintenance order made under the Family Law Act 1975, or any other formal maintenance obligation.”

11. The factual contest before the Minister’s delegate, and before the Tribunal, was whether the relationship between the applicant and his wife was genuine and continuing, such that the applicant was the ‘spouse’ of his wife within the meaning of “spouse” as set out in Regulation 1.15A. The Tribunal was not satisfied that the relationship was genuine and continuing. That is a finding of fact, in respect of which no further right of review is available.
12. It is convenient to deal first with the second of the applicant’s two grounds, namely that, although not expressly articulated, the evidence and documents before the Tribunal raised for consideration a case that criterion 100.221(4) applied. I do so because the conclusion as to whether or not such a case was raised for consideration will be important in the assessment of the applicant’s first ground. At first blush, it is somewhat difficult to reconcile the co-existence of the argument maintained before the Minister’s delegate and the Tribunal, which was that the applicant and his wife remained in a genuine and

continuing relationship, with the argument sought to be raised before this Court, which is that the applicant was the victim of domestic violence perpetrated by his wife. Nevertheless, if the argument was open to the applicant before the Tribunal, it ought to have been considered.

13. At paragraph 69 of its Reasons, the Tribunal stated:

“ . . . there is no suggestion in the claims or evidence that the alternative provisions contained in cl. 100.221(4) apply.”

14. This makes it clear, in my view, that the Tribunal has not considered an argument that cl. 100.221(4) might apply. If the Tribunal ought to have considered cl. 100.221(4) it is plain that it has not, and would thereby have committed jurisdictional error. The critical question is whether the Tribunal was required to consider cl. 100.221(4).

15. The leading authority in this context is the decision of the Full Federal Court in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No. 2)* (2004) 144 FCR 1. There, at [55], the Court in its joint reasons referred to a “substantial, clearly articulated argument relying upon established facts” as being one that required consideration to avoid a conclusion that there had been a constructive failure to exercise jurisdiction, and therefore jurisdictional error. At [58] and in the last paragraph of [61] the Full Court said:

“[58] The review process is inquisitorial rather than adversarial. The Tribunal is required to deal with the case raised by the material or evidence before it: Chen v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 157 at [114] (Merkel J). There is authority for the proposition that the Tribunal is not to limit its determination to the “case” articulated by an applicant if evidence and material which it accepts raise a case not articulated: Paramanathan v Minister for Immigration and Multicultural Affairs (19998) 94 FCR 28 at 63 (Merkel J); approved in Sellamuthu v Minister for Immigration and Multicultural Affairs (1999) 90 FCR 287 at 293-294 (Wilcox and Madgwick JJ). By way of example, if a claim of apprehended persecution is based upon membership of a particular social group the Tribunal may be required in its review function to consider a group definition open on the facts but not expressly advanced by the applicant: Minister for Immigration and Multicultural Affairs v Sarrazola (No 2) (2001) FCR 184 at 196

per Merkel J, Heerey and Sundberg JJ agreeing. It has been suggested that the unarticulated claim must be raised “squarely” on the material available to the Tribunal before it has a statutory duty to consider it: SDAQ v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 129 FCR 137 at [19] per Cooper J. The use of the adverb “squarely” does not convey any precise standard but it indicates that a claim not expressly advanced will attract the review obligation of the Tribunal when it is apparent on the face of the material before the Tribunal. Such a claim will not depend for its exposure on constructive or creative activity by the Tribunal.”

“[61] ...We are of the view that the observations by Merkel J in Paramanathan, by the Full Courts in Sellamuthu and Sarrazola (No 2) and by Cooper J in SDAQ are consistent with the proposition that the Tribunal is not required to consider a case that is not expressly made or does not arise clearly on the materials before it. The Tribunal’s obligation is not limited to procedural fairness in responding to expressly articulated claims but, as is apparent from Dranichnikov, extends to reviewing the delegate’s decision on the basis of all the materials before it.”

16. More recently, in *Minister for Immigration and Citizenship v Le* [2007] FCA 1318 Kenny J at [60] set out numerous authorities in support of the proposition that the Tribunal has no general obligation to initiate enquiries or to make out an applicant’s case for him or her, but accepted that there was also authority for the limited proposition that, in certain rare or exceptional circumstances, the Tribunal’s failure to enquire may ground a finding of jurisdictional error because the failure may render the ensuing decision manifestly unreasonable in the sense used in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 22. Her Honour, by reference to authority, said that a finding of jurisdictional error on this ground would be rare.
17. The Full Court in *SBBA v Minister for Immigration & Multicultural & Ethnic Affairs* [2003] FCAFC 90 said at [8]:

“It is well established that all substantive issues raised by the evidence before the Tribunal must be considered even if an applicant does not articulate all such claims . . . It is, however, no part of the Tribunal’s function to make good a case, which the applicant has not articulated, only because there is some evidence of elements of a claim: Parra v Minister for Immigration & Multicultural Affairs [2000] FCA 85 at [13]

18. The Tribunal is not obliged to ask additional questions or advise the applicant that his evidence is insufficient to establish a ground: *Samarasekera v MIMA* [2001] FCA 1335.
19. The standard which must be applied before it can be said that a claim on an alternative basis was one with which raised by the applicant was discussed by Hill J in *Ahvazi v MIMA* [2002] FCA 279, where his Honour after referring to statements of principle in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1 at [75], [95] and to the judgment of Merkel J in *Paramanathan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28 said, at [19] – [23]:

“The difficulty which these statements, authoritative as they are, throws up is in what circumstances can it be said that the Tribunal has constructively failed to exercise its jurisdiction to deal with a case which may be available to an applicant, but which is not argued by an applicant at all.

In one sense it is difficult to see how a Tribunal commits an error of law . . . when the applicant himself or herself does not really raise the case squarely. To find reviewable error may be thought, at least in some cases, to be unfair to the Tribunal. While it is true that the Tribunal operates in an inquisitorial, rather than adversarial way, it may be said that the Tribunal really has no obligation to an applicant to make an applicant’s case for him or her and perhaps somewhat bizarre to conclude that in doing so the Tribunal makes an error of law.

Be that as it may, it is obvious from the extracts both from the High Court and the Full Court of this Court that there will be cases where the failure of the Tribunal to consider a case may involve an error of law. The question is then, what are the boundaries of this principle.

In the passage, secondly extracted from the judgment of the High Court in Yusuf, their Honours refer to the situation where the case which the Tribunal did not rule upon was one which the applicant had ‘based’ his case. . .

The test adopted by Merkel J and approved by Full Courts of this Court which are binding upon me is clearly a lesser test. To come within it, it would suffice that the material or other evidence before the Tribunal raises the case, even if the case is not one on which the applicant bases himself and therefore raises squarely

for decision by the Tribunal. I have some doubt whether this test is really consistent with what is said in Yusuf but, in any event, as I have said, I am bound by the decisions of Full Courts and am content to accept the test as set out in the extract from the judgment of Merkel J. above.”

20. In *Ratunaiwai v MIMA* [2002] FCA 311 Hill J said, at [14]:

“It is not for the Tribunal to make out a case for an applicant, nor is it, in my opinion, for the Tribunal to have to dredge through the totality of material which may be before it to discover whether somewhere among that material there is an argument that might be relevant to the applicant’s case. It will be different where the facts before the Tribunal clearly raise an issue, a decision on which may affect the outcome of a review. In such a case the Tribunal will usually have an obligation to address that issue, even if the applicant does not request directly that the Tribunal do so . . . “

21. The question then is whether on the material available to it a case of domestic violence committed by his wife against the applicant was presented, without the Tribunal having to construct such a case, or ask the applicant further questions to establish it. I have considered the material available to the Tribunal. No direct statement was made by the applicant that he had been subjected to domestic violence. It is only if one were carefully scrutinising the materials available to the Tribunal looking for any possible evidence of domestic violence that some pieces of information might have become more significant:

- a) In letter from applicant’s migration agent dated 29 June 2008, at numbered paragraph 7 it was stated:

“The appellant claims that he may have been a ‘victim of hate’, as Vicky’s mother was always putting pressure on him for monies when he was already making a substantial contribution towards the household expenses.”

- b) In attachment J to the same letter is a case note made by a Centrelink officer recording the applicant:

- i) stating the conflict with his wife had mainly been verbal abuse, but the police had been contacted twice by his mother-in-law, but he stated his father in law sent them away;

- ii) stating his wife had ripped a chain off his neck and he had a scar around his stomach area from another physical altercation he had;
 - iii) reporting that in June 2007 he was kicked out of the home for three weeks, and he mainly slept in his car and sometimes with friends. At the time he was uncertain what the problem was and why he was kicked out.
- c) The Tribunal had an email from the applicant's counsel to the applicant's migration agent dated 1 July 2008 in which reference was made to threats being made by the wife's relatives to a witness in the Apprehended Violence Order proceedings brought by the wife. However, the comment to this being prejudicial seems directed toward establishing a genuine and ongoing relationship between the applicant and his wife;
- d) Although at T6 of the hearing before the Tribunal the witness Mahony made reference to the applicant being "kicked out of the house", at T 7 the Tribunal member said:

"Now as I said before it seems that the issue is whether or not you are the spouse within the meaning of spouse as it is defined in that regulation that I mentioned. Now I'll ask your agent again because he is aware of your case is that your understanding Mr Chand?"

22. Both the agent and the applicant replied "yes".

- a) There was evidence before the Tribunal that the applicant's wife had made allegations of domestic violence against the applicant. At paragraph 19 of the Statement of Reasons the Tribunal member makes reference to the applicant's wife's allegations, including an allegation that the applicant had attempted physical harm to her and had made threats to her and her family. At paragraph 20 the Tribunal member, with reference to the applicant's evidence, recorded that:

"He said his wife's attitude towards him started to change around March 2007, as did his mother in law's attitude. There were some disputes which were later patched up but he came to realise that his mother in law was influencing his wife against him. Around

May 2007 there was a particular fight between himself and his wife, and she threatened to withdraw his sponsorship . . . Despite the various arguments, he said it was his view that they were still living together as husband and wife.”

b) At paragraph 25 of the Statement of Reasons the Tribunal member records that the Departmental file contained copies of documents relating to a protection order application made by the applicant’s wife against him on 17 March 2008;

c) At paragraph 27 of the Statement of Reasons the Tribunal member said:

“The [applicant’s] agent also acknowledged that the applicant was the subject of a temporary protection order taken out by Ms Tucker on 17 March 2008 but said the applicant was challenging this order in court in Queensland. He indicated that further court action against Ms Tucker “particularly in relation to the withdrawal of sponsorship and also in relation to some very serious matters are being contemplated” and that he intended to submit documentary evidence in relation to these matters and make further submissions.”

23. There was nothing in the applicant’s discursive evidence to the Tribunal that hinted at domestic violence being perpetrated against him.

24. In my view, the applicant has not raised a case that he has been the victim of domestic violence, nor does the material before the Tribunal raise such a case in the manner required by the authorities to which I have referred. At best it can be said that the material before the Tribunal contained some snippets of information that might have led the inquirer to suspect that all was not well in the applicant’s household and that the domestic violence allegations may have been levelled by each spouse against the other. However, to do so, it would have been necessary to dredge through the file, specifically looking for those snippets of information, which the above authorities state is not required of the Tribunal. In order for an argument that domestic violence was a relevant consideration for the Tribunal, the Tribunal member would not only have had to dredge through the file looking for evidence, but also to view it in a way favourable to the applicant, and to then construct a case for him by asking further questions designed to

elicit further information in support of that argument. As the authorities make clear, this constructive or creative activity is not required of the Tribunal.

25. There is a further difficulty with this aspect of the applicant's case. Regulation 1.22(1) provides:

"A reference in these Regulations to a person having suffered domestic violence is a reference to a person being taken, under regulation 1.23, to have suffered domestic violence."

26. Regulation 1.23 then sets out a detailed regime for determining whether a person was taken to have suffered domestic violence. None of the prerequisites have been satisfied in this case.
27. In *SOK v Minister for Immigration and Citizenship* (2008) 249 ALR 651 it was made clear that a claim that the relevant domestic violence had occurred could be first raised before the Tribunal. However, in that case, unlike the present case, the applicant had submitted material in accordance with the requirements of regs 1.23(1A)(b)(ii) and 1.24. Here, no evidence was presented that came close to satisfying regs 1.23 and 1.24.
28. That, in my view, adds further weight to the conclusion that the case that cl. 100.221(4) had application in the circumstances before the Tribunal was not raised. I am not saying that the applicant could not raise a case of domestic violence, in the *NABE* sense, without providing the material required by the Regulations. What I am saying is that the complete absence of any attempt to provide such material adds weight to the conclusion that no such case was raised.
29. In my view, the applicant has not established that the Tribunal committed jurisdictional error by failing to deal with a relevant consideration, namely the possible application of cl. 100.221(4).
30. The conclusion that an argument of the possible application of cl. 100.221(4) did not arise on the material before the Tribunal makes the first argument of the applicant particularly tenuous. In *Gnanasambanther v MIMA* [2000] FCA 1911 at [3] Tamberlin J said:

"There is no duty of the RRT to embark on a general inquiry into every aspect of the evidence presented on a refugee application if

that evidence is not raised, relied on or advanced by the applicant or the representatives of the applicant. As Gummow and Hayne JJ said in Abebe v The Commonwealth (1999) 162 ALR 1 at 51:

“The proceedings before the Tribunal are inquisitorial and the Tribunal is not in the position of a contradictor. It is for the applicant to advance whatever evidence or argument she wishes to advance in support of her contention that she has a well founded fear of persecution for a Convention reason. The tribunal must then decide whether that claim is made out.””

31. The same observations can be made concerning the Migration Review Tribunal.
32. During the course of argument, counsel for the applicant submitted that there was an obligation on the Tribunal to consider whether each of the criteria in cl. 100.221 could be satisfied, whether or not they were specifically relied upon by the applicant. In my view, the Tribunal is not required to consider issues that are either not relied upon by the applicant, or do not arise on the evidence and materials put before the Tribunal.
33. In *SZBEL v Minister* (2006) 231 ALR 592 at [40] in the joint reasons of the members of the High Court of Australia it was said:

“More than once it has been said that the proceedings in the Tribunal are not adversarial but inquisitorial in their general character. There is no joinder of issues between parties, and it is for the applicant for a protection visa to establish the claims that are made. . . And although there is no joinder of issues, the Act assumes that issues can be identified as arising in relation to the decision under review. While those issues may extend to any and every aspect of an applicant's claim to a protection visa, they need not. If it had been intended that the Tribunal should consider afresh, in every case, all possible issues presented by an applicant's claim, it would not be apt for the Act to describe the Tribunal's task as conducting a "review", and it would not be apt to speak, as the Act does, of the issues that arise in relation to the decision under review.”

34. It is correct, as was submitted by counsel for the applicant, that the duty of the Tribunal was to form its own view on the merits of the case, without relying on any presumption as to the correctness of the findings of the Minister's delegate: *Aung v Minister* [2000] FCA 1562 at [4] – [7].

35. However, the Tribunal was entitled to distil from the material before it what were the issues for its determination. The Tribunal was primarily obliged to consider and determine the case advanced by the applicant.
36. I have extracted at paragraph 20d. above an exchange during the Tribunal hearing. This confirmed that the applicant was putting his case on the basis that there was a genuine and continuing relationship between himself and his spouse.
37. Further, at T3 the Tribunal member said:
- “So what that means is that I have to be satisfied that you and Ms Tucker were in a married relationship as described in sub regulation 1.15A(1A) . . . at that time you applied and that you’re in – well sorry, not at the time you applied but that you were in this relationship and that you are still in this relationship now.”*
38. The whole focus of the hearing on 4 July 2008 was on the ongoing commitment of the relationship.
39. However, I reject the applicant’s submission that the Tribunal member did not properly discharge his function and confined himself effectively to an enquiry as to whether the decision of the Minister’s delegate was correct.
40. The duty to review is created by s. 348 of the Act. The Tribunal conducts a de novo review of the matter under s. 349(1) of the Act.
41. A review of the transcript of the hearing does support the conclusion that the Tribunal member confined (or, more properly, directed) himself to the question of whether there was the requisite ongoing relationship. However that is unexceptional where that was the case presented to the Tribunal and where the material before the Tribunal did not clearly or squarely raise any alternative case.
42. The Tribunal member made it clear at T3 that he understood what his function was. He took additional evidence from two witnesses and from the applicant.
43. In my view, the applicant’s contention that the Tribunal member approached the determination of the review with a partially closed mind because he did not conceive of the possible application of cl.

100.221(4) fails because such a case was not presented for determination. The Tribunal member was not required to set up and knock down straw arguments. He was required to decide the review on the case put before him. That case was that the applicant and his wife were in a genuine and continuing relationship.

44. A fair reading of the Statement of Reasons for the decision of the Tribunal shows that the Tribunal carefully considered the case presented to it, and carefully analysed the evidence touching upon the issue for determination. The Statement of Reasons shows no reliance upon, nor adherence to, the decision of the Minister's delegate.

45. At paragraph 24 of the Statement of Reasons the Tribunal member makes reference to the applicant's letter to the Department dated 12 November 2007 asserting that he was happily living with his wife and that the relationship between them was genuine and continuing.

46. The Tribunal member delivered detailed Reasons explaining why he was not satisfied that the applicant's relationship was genuine and ongoing.

47. At paragraph 7 of the Statement of Reasons the Tribunal member correctly recorded that the primary criteria to be satisfied at the time of the decision are those set out in cl. 100.22. Although referring to subclauses (2), (2A), (3), (4) and (4A) the Tribunal member only extracted the text of subclauses (2) and (2A). At paragraph 8 of the Statement of Reasons specific but brief reference was made to subclauses (3) and (4). Thus, the Tribunal member correctly identified his task and how it was to be approached.

48. At paragraph 11 the Tribunal member stated:

"The principal issue in the present case is whether the applicant is the spouse of the sponsoring spouse at the time of the decision."

49. It appears from paragraph 34 of the Statement of Reasons that the Tribunal member's focus was on the nature of the spousal relationship and this formed the direction of the questions asked during the hearing. At paragraphs 54 – 65 the Tribunal member discussed the evidence touching upon the conclusion as to the nature of the relationship.

50. At paragraph 69 the Tribunal member said:

“The Tribunal is not satisfied that the applicant continues to be the sponsor’s spouse within the meaning of r. 1.15A of the Regulations. Therefore, the Tribunal is not satisfied that the applicant satisfies the spousal requirement contained in both cl. 100.221(2)(b) and 100.221(2A)(b) for the grant of a Subclass 100 visa. Furthermore, the alternative provisions of cl. 100.221(3) do not apply and there is no suggestion in the claims or evidence that the alternative provisions contained in cl. 100.221(4) apply. Neither is the alternative criterion in cl. 100.221(4A) applicable in this case. Therefore, the applicant does not meet the prescribed criterion contained in cl. 100.221(1) and cannot be granted a Subclass 100 visa.”

51. In my view, on the evidence presented, this was a conclusion entirely open to the Tribunal. No evidence of jurisdictional error is demonstrated in the manner in which the Tribunal went about its assessment of the applicant’s claim.

52. Nor is criticism of the decision of the Minister’s delegate, to which no reference was made by the Tribunal, relevant. The applicant submitted (written submissions, paragraph 42) that the Tribunal failed to detect errors in the decision of the Minister’s delegate, and that it should be concluded that the Tribunal did not carefully and properly complete its review function. However, to detect error in the delegate’s decision is not the Tribunal’s function. It is not required to critique the decision of the delegate or conduct some sort of appeal from that decision. The Tribunal is required to conduct its review afresh. Any errors presented in the delegate’s decision need not be commented on or even referred to.

53. Neither of the grounds argued by the applicant should be accepted. The application must therefore be dismissed. Costs should follow the event.

I certify that the preceding fifty-one (51) paragraphs are a true copy of the reasons for judgment of Wilson FM

Associate: Beverley Schmidt

Date: 1 July 2009